

ROSEANNE M. BELL ET AL.

IBLA 89-184, et al.

Decided July 16, 1991

Appeals from three decisions of the Nevada State Office, Bureau of Land Management, denying requests for extensions of time to make final proof and cancelling desert land entries. N-37187, et al.

Reversed and remanded.

1. Desert Land Entry: Extension of Time

In order to obtain an extension of time for the submission of final proof of a desert land entry, the entryman must show that the failure to reclaim the land within the entry during the statutory life of the entry was due, without fault on the entryman's part, to unavoidable delay in the construction of the necessary irrigation works. Where the entryman establishes that financial institutions were unwilling to lend money because of the inability of BLM to patent the land due to the existence of a Federal Court injunction, the entryman may be granted an extension of time to make the final proof, as provided by 43 U.S.C. § 333 (1988).

APPEARANCES: Michael C. Miller, Esq., Klamath Falls, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Roseanne M. Bell, Leah L. Bell, and James N. Bell, members of the same family, have appealed from separate decisions of the Nevada State Office, Bureau of Land Management (BLM), denying their requests for extensions of time to make final proof in connection with their desert land entries and cancelling those entries. ^{1/} We have, sua sponte, consolidated all three appeals because of the substantial similarity of legal issues involved.

On September 27, 1982, the Bells filed their petitions for classification and applications to make desert land entries, serialized as N-37187 through N-37189, which aggregated a total of 932.05 acres of land situated

^{1/} Appellants, the desert land entries, the land included in the entries, and the dates of the BLM decisions appealed from are set forth in Appendix A.

in secs. 13 and 24, T. 12 N., R. 43 E., and secs. 18, 19, 30, and 31, T. 12 N., R. 44 E., Mount Diablo Meridian, Nye County, Nevada, pursuant to section 1 of the Desert Land Act (DLA), Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1988). All of the land is situated in the Big Smoky Valley in central Nevada. In their applications, the Bells proposed to drill a well on each tract of land and to convey water to a sprinkler system, which would be used to irrigate the land. On January 4, 1984, pursuant to their petitions, BLM classified the subject land as suitable for desert land entry.

By decisions dated February 21, 1984, BLM allowed the Bells' desert land entries, subject to the stipulation that the land not be cleared for cultivation purposes until State water permits had been obtained and wells had been drilled and flow tested. In separate letters of the same date, BLM informed the Bells of the requirements for submitting annual proof of expenditures with respect to their entries and for final proof necessary for obtaining patent to the subject land. With respect to final proof, BLM stated that such proof must include "[d]evelopment of a permanent source * * * of water considered by [BLM] to be sufficient to irrigate all the acreage in [each] entry, * * * development of an irrigation system * * * demonstrably capable of irrigating all the irrigable land in [each] entry [and] cultivation of at least one-eighth of the land in [each] entry."

On July 16, 1984, the State of Nevada approved the Bells' State water permits. Subsequently, on November 26 and December 18, 1984, the Bells filed annual proofs with BLM. Therein, the Bells stated that they had expended a total of approximately \$24,000 in drilling a well on each tract of land and had also paid an additional \$1,800 for the State water permits and almost \$4,300 for evaluations by a hydrogeologist of drill cuttings and electric logs with respect to the three wells. ^{2/}

By letters dated May 31, 1985, BLM informed the Bells that, in accordance with 43 CFR 2521.5(g), no further annual proof needed to be filed. In addition, BLM stated that "[f]inal proofs * * * must be made on or before February 21, 1988, to avoid cancellation of your entry." The requirement to submit final proof within 4 years after the date of entry is found in section 7 of the Act of March 3, 1877, as amended, 43 U.S.C. § 329 (1988), and 43 CFR 2521.6(a).

On May 8, 1986, BLM notified appellants that their desert land entries were involved in litigation brought by the National Wildlife Federation (NWF) relating to alleged violations of section 202 of the Federal Land

^{2/} Because the total expenditures with respect to each entry exceeded \$3 per acre, the Bells indicated that the annual proofs were for the first, second, and third years. In so doing, the Bells complied with the suggestion contained in the Feb. 21, 1984, letters to them outlining the annual proof requirements. In those letters, BLM had further stated that "[t]his action on your part will eliminate the need for further submission of annual proofs prior to filing final proof."

Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1988). ^{3/} BLM advised them that, "While this lawsuit is in progress, you may continue to develop the land under the terms of your entry-allowed decision[s]," but that, "until the lawsuit is resolved, we cannot transfer title of the land to you."

On April 27, 1987, Ag Grow Exchange, Inc. (Ag Grow), inquired on behalf of the Bells whether, in view of the problems caused by BLM's inability to transfer title to the subject land, BLM would allow extensions of time to make final proof. BLM responded to Ag Grow's inquiry by letter dated May 11, 1987, stating that the question of whether BLM could grant extensions in such a situation was being analyzed by the BLM Washington office and the Office of the Solicitor.

By Information Bulletin No. 88-30, dated October 27, 1987, the Director, BLM, relying on a September 4, 1987, memorandum from the Deputy Associate Solicitor for Energy and Resources, notified the Nevada State Director that extensions based on the inability of parties to make final proof occasioned by the NWF litigation could be granted "[u]nder certain conditions." The conditions which might qualify for an extension were briefly set forth in the Deputy Associate Solicitor's September 1987 memorandum, at page 2:

^{3/} BLM specifically noted that, on Feb. 10, 1986, the Federal District Court for the District of Columbia had issued a preliminary injunction, which "prohibited any action that was inconsistent with any * * * classification that was in effect on January 1, 1981." As stated by the district court, the injunction prohibited the Department from "modifying, terminating, or altering any * * * classification * * * governing protection of the lands in the public domain that was in effect on January 1, 1981, or taking any action inconsistent with such * * * classifications." NWF v. Burford, 676 F. Supp. 280, 281 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987). On Nov. 4, 1988, the district court dismissed the suit for lack of standing and vacated the preliminary injunction, a decision which was ultimately sustained by the Supreme Court. See NWF v. Burford, 699 F. Supp. 327 (D.D.C. 1988), rev'd, 878 F.2d 422 (D.C. Cir. 1989), rev'd, 110 S. Ct. 3177 (1990). However, the injunction was in effect at all relevant times herein.

The record indicates that, prior to classification of the subject land for desert land entry, it had been subject to a proposed classification for multiple use management (N-1574), which had been in effect on Jan. 1, 1981. See 33 FR 19856 (Dec. 27, 1968). The proposed classification had provided that it had the effect of segregating the land from desert land entry. Thus, we conclude that, while the February 1986 preliminary injunction remained outstanding, the Department was prohibited from taking any action inconsistent with this classification, which included issuing patents with respect to desert land entries. Cf. James A. Malesky (On Reconsideration), 106 IBLA 327, 332 (1989) (unallowed entry).

To receive favorable consideration, an extension application for making final proof must show unavoidable delay in the construction of irrigation works, without fault on the part of the entryman. 43 C.F.R. Subpart 2522. Lack of financing due to title uncertainties caused by the preliminary injunction in some circumstances might be held sufficient to support a finding of unavoidable delay without fault.

On February 18, 1988, the Bells filed requests for extensions of time to make final proof. Specifically, the record indicates that the Bells desired the extensions because, due to the NWF injunction, they had been unable to obtain financing for development of the subject land. In a November 20, 1986, letter to BLM, James N. Bell had earlier explained that, because of the NWF lawsuit, "our bank will not loan any more money for the development of the Desert Land Entries," thus specifically indicating that the Bells had sought financing from their own bank, but had been denied.

BLM responded to the Bells' requests for extensions of time to make final proof by letters dated March 1, 1988. Therein, BLM stated that an extension of time would only be granted "if your delay in constructing an irrigation system was unavoidable, and without fault on your part." BLM requested that the Bells have "each of the financial institutions you approached about * * * financing send us a statement as to when you contacted them, and the reasons for their refusal to provide financing." BLM provided 90 days from receipt of the letters for submission of the requested statements.

The Bells submitted several letters to BLM from prospective lenders, a number of which indicated that financing was not available because of the lenders' fear that the Bells would not be able to obtain title from BLM even if they met the requirements of the DLA. Robert J. Milts, a consultant from Grants Pass, Oregon, had previously advised Bell that, while financing would be available if the Government successfully defended the NWF suit, no banks would lend the Bells money if the Government was unable to issue patents upon a successful completion of their entries. Excalibur Financial Services, headquartered in Sutherlin, Oregon, declared that financing could not be obtained for the entries until the Bells had title to the property or a written guarantee from BLM that title would issue when the Bells complied with the provisions of the DLA. The Bells indicated that other banks also refused financing when they learned that BLM would be unable to issue a patent upon completion of the entries.

On July 12, 1988, a BLM realty specialist prepared land reports in order to consider whether the Bells' requests for extensions of time to make final proof should be granted. Each of the reports recommended that the request be denied based on the entryman's or entrywoman's lack of due diligence in developing his or her entry, failure to complete and flow test a well, and failure to obtain financing during the 26-month period prior to notification of the effect of the preliminary injunction issued in the NWF litigation.

As evidence of the lack of due diligence, the realty specialist noted that the Bells had taken no action with respect to their entries since drilling the wells in July and September 1984. She pointed out that the failure to complete and flow test the wells precluded the Bells from clearing and cultivating the land, in accordance with the BLM decisions allowing the entries.^{4/} Finally, each of the land reports noted that the entries had been allowed more than 2 years prior to the notification of the NWF injunction, emphasizing that "half of the time allotted for proving up had elapsed when the preliminary injunction came into effect." The Area Manager, Tonopah Resource Area, and the District Manager, Battle Mountain District, Nevada, BLM, both concurred in the land reports and recommended that the extension requests be denied.

In its November 1988 decisions, BLM denied the Bells' requests for extensions of time to make final proof with respect to their desert land entries. While noting that the Bells had requested extensions of time based on their inability to obtain financing for development of their entries because of the February 1986 preliminary injunction issued in the NWF litigation, BLM denied their requests on the ground that, regardless of the injunction, they had not acted with reasonable diligence in seeking such financing:

There was a period of two years from the time entry was allowed (February 21, 1984) until the preliminary injunction became effective (February 15, 1986) in which to obtain financing to develop the entry. This represents one-half of the time allotted by law to submit final proof. The records show no evidence of any attempt to acquire any needed financing for the construction of irrigation works to diligently pursue completion of the entry during this time. All the evidence submitted by you regarding the inability to get financing is dated 1987-1988.

Having determined that the Bells were not entitled to an extension of time in which to make final proof and, in view of the fact that they had failed to submit the proofs within the time allowed, BLM cancelled the entries for failure to show due diligence in developing them. The Bells timely appealed these decisions to this Board.

In their statements of reasons for appeal (SOR), appellants contend that they are entitled to extensions of time to make final proof under 43 CFR 2522.3. They argue that the circumstances which obtain with respect to their entries "would support a finding of unavoidable delay without fault," in accordance with that regulation (SOR at 1). As proof of this, they point to evidence already in the record that the February 1986 preliminary injunction issued in the NWF lawsuit precluded them from obtaining financing to construct the necessary irrigation works. They assert that this delay persisted for two of the 4 years allowed for the submission of

^{4/} The report also noted that, since the holes had not been cased, they presented a danger of contamination of the aquifers.

final proof and conclude that they only seek the "full four years" to which they were entitled. Id. at 2. For reasons which we set forth, we are in substantial agreement with appellants and accordingly reverse the decision below.

[1] Section 7 of the DLA, 43 U.S.C. § 329 (1988), requires that an entryman submit, "within the period of four years" after allowance of a desert land entry, satisfactory proof of reclamation and cultivation of the entered land together with the required payment. 5/ Thus, as appellants correctly point out, an entryman is provided 4 years from the date of entry to submit final proof. See 43 CFR 2521.6(a). This 4-year period may be extended for an additional 3 years pursuant to section 3 of the DLA, 43 U.S.C. § 333 (1988), and its implementing regulation, 43 CFR 2522.3. 6/ That section provides that such an extension may be granted where the entryman establishes to the satisfaction of the Secretary that he has complied with the requirements of the Act of March 3, 1877, in good faith, "but that because of some unavoidable delay in the construction of the irrigating works intended to convey water to the [entered] lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land." 43 U.S.C. § 333 (1988).

In the present case, appellants did nothing more with respect to their desert land entries than drill a well on each tract of land during the 4-year period following allowance of the entry. No well casings were set, no pumps were installed, no pipes were laid, and no sprinkler systems were built. Thus, appellants could not have conveyed water from the underlying aquifer for purposes of irrigating the subject land. Accordingly, appellants neither reclaimed nor cultivated the land.

Appellants attribute their failure to do anything more to their inability to obtain any financing for such work because of the February 1986 preliminary injunction in the NWF litigation. In its November 1988 decisions, BLM did not dispute appellants' assertions that they were unable to obtain financing subsequent to the issuance of the injunction, and that their failure to obtain financing was due to the preliminary injunction, and that their failure to obtain financing precluded construction of the necessary irrigation works. Rather, BLM's November 1988 decisions hinged solely on the conclusion that appellants were not entitled to an extension because the NWF injunction had not prevented them from obtaining financing during

5/ The reclamation required under the statute means "conducting water in adequate amounts and quality to the land so as to render it available for distribution when needed for irrigation and cultivation." 43 CFR 2520.0-5(a)(1). In addition, section 5 of the Act of Mar. 3, 1877, as amended, 43 U.S.C. § 328 (1988), requires the cultivation of one-eighth of the land. Cultivation is defined as the "operation, practice, or act of tillage or preparation of land for seed, and keeping the ground in a state favorable for the growth of crops." 43 CFR 2520.0-5(a)(2). See generally James M. Mills, 108 IBLA 155 (1989).

6/ A further 3-year extension is authorized by 43 U.S.C. § 334 (1988) under similar conditions.

the first half of the 4-year period of time allowed for submitting final proof. Obviously, BLM regarded the failure to obtain financing and to then construct irrigation works during the first 2-year period as avoidable and, thus, appellants' inability to construct the irrigation works was not without fault on their part.

Appellants do not challenge BLM's conclusion that the February 1986 preliminary injunction did not preclude them from obtaining financing prior to its issuance nor do they allege that circumstances existed prior to the injunction which made it impossible to obtain financing and construct the necessary irrigation works and proceed to reclaim and cultivate the subject land during that earlier time period. Rather, they argue that they were precluded from obtaining financing for construction of such irrigation works after issuance of the preliminary injunction and, thus, were not afforded the full 4-year period to fulfill the statutory requirements contemplated by the DLA.

Entrymen under the Act of March 3, 1877, are, as noted above, afforded 4 years in which to make final proof. Nothing in that statute or its implementing regulations precludes them from delaying construction of the necessary irrigation works until the third year following allowance of the entry and then proceeding to reclaim and cultivate the land. See Wright v. Guiffre, 68 IBLA 279, 285-87 (1982), aff'd, Wright v. Guiffre, No. 83-1148 (D. Idaho June 18, 1984). Moreover, nothing in section 3 of the Act of March 3, 1908, or its implementing regulations bars them from entitlement to an extension of time to make final proof merely because the circumstances which prevented the entryman from constructing the irrigation works did not arise until mid-way through the 4-year period. All that is required is that construction have been unavoidably delayed, without fault on the part of the entryman, and that, for this reason, proof of reclamation and cultivation cannot be made "within the 4 years." 43 CFR 2522.3 (emphasis added).

In other words, the key consideration is whether the circumstances alleged may be said to be the causative factor in preventing an entryman from constructing the irrigation works and whether these circumstances arose without fault of the entryman. Since the law permits 4 years in which to perform the requisite work and submit final proof, the fact that an entryman allowed 2 years to elapse prior to attempting to obtain the financing necessary to proceed with the entry cannot be considered dispositive of the question whether the failure to make final proof can be attributed to the "fault" of the entryman.

On the other hand, appellants' contention that they should automatically be entitled to the full 4 years in which to reclaim and cultivate their entries cannot be sustained. The critical question is not whether, for some period of time, special circumstances arose over which the entryman had no control which inhibited or prevented actions on an entryman's part in furtherance of his entry, but rather, whether these special circumstances, when viewed in the totality of circumstances surrounding the entry, can be deemed the causative factor in preventing compliance with the requirements of the DLA. Thus, each case must necessarily be viewed on its own merits with due consideration for the totality of facts disclosed in each. See,

e.g., Charlotte Peck, 116 IBLA 169, 174 (1990) ("Each application for an extension of time must, of course, be considered on its own merits and evaluated in light of all the circumstances shown").

The foregoing may be illustrated by a number of examples. Thus, had the injunction issued on a date by which there was already insufficient time to complete the irrigation and cultivation requirements of the DLA, appellants would have a clearly insufficient basis upon which to seek an extension since the injunction would not have been the causative factor in their inability to make final proof. Similarly, had the injunction prevented appellants from obtaining financing in the first 2-year period, the mere fact of the injunction, standing by itself, would not have warranted an extension since sufficient time remained in which to complete the entries. It might, indeed, when coupled with other factors equally beyond the control or reasonable expectations of the entrymen provide the basis for an extension of time, but, since adequate time to complete the entries would have remained, it could not be the sole factor upon which an extension was predicted.

In any event, appellants did receive the full 4 years to make final proof as provided by the statute. Had they proceeded to obtain the necessary financing prior to the issuance of the NWF injunction, that injunction would not have been considered a bar in any fashion to completion of the entry. Nothing in the injunction, per se, limited or constrained their rights under the DLA. Rather, the impact of the injunction was to affect the willingness of lending institutions to provide funds since, quite apart from any actions on the entrymen's part, BLM was prevented, during the injunction's duration, from passing title to the land which was the subject of the entry. But the mere fact that, for a period of time, the ability to obtain financing was constrained would not, in and of itself, compel the conclusion that appellants had shown entitlement to an extension of time.

Moreover, it is important at this point to note that the simple inability of an individual to obtain the financing necessary to construct irrigation works has never been deemed sufficient, in itself, to warrant the grant of an extension of time. See, e.g., Pamela M. Brower, 26 IBLA 366 (1976). Any individual seeking to make a desert land entry is presumed to be aware of the necessity of constructing irrigation works within the 4-year period permitted by the DLA and would be expected to have anticipated either paying for the expenses out of personal finances or through loans secured from other individuals or from lending institutions.

Where, in the normal course of events, it is impossible to obtain such financing, owing either to the vicissitudes of the normal business cycle or because of the creditworthiness of the individual, such inability does not justify an extension because this possibility should have been apparent and anticipated at the commencement of the 4-year period. The circumstances in the instant case, however, involve a contingency which did not involve the Bells' credit worthiness and could not reasonably have been anticipated, namely, the issuance of an injunction which arguably constrained the willingness of lenders to advance the needed funds.

Clearly, appellants can, in no way, be charged with responsibility for the issuance of the NWF injunction. The availability of an extension, thus, is dependent upon a showing that this injunction and its effect on financial institutions was the causative factor in their failure to make final proof timely. Unlike the Charlotte Peck case, appellants herein have submitted substantial evidence of the negative impact which the injunction and the resultant inability of BLM to guarantee issuance of title, even assuming that appellant were able to timely make final proof, had on the willingness of financial institutions to advance funds for the completion in its totality, we conclude that appellants have shown their entitlement to the requested extension of time and BLM's decision denying the extension must be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case files are remanded for further action consistent with the foregoing.

James L. Burski
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

APPENDIX A

<u>IBLA</u> <u>No.</u>	<u>Land</u> <u>Appellant</u>	<u>Entry</u>	<u>Desert</u> <u>Date of</u> <u>Land</u> <u>Involved</u>	<u>BLM</u> <u>Decision</u>
89-184	Roseanne M. Bell	N-37187	Sec. 13, T. 12 N., R. 43 E., Sec. 18, T. 12 N., R. 44 E., Mount Diablo Meridian	Nov. 29, 1988
89-185	Leah L. Bell	N-37188	Secs. 30 & 31, T. 12 N., R. 44 E., Mount Diablo Meridian	Nov. 25, 1988
89-186	James N. Bell	N-37189	Secs. 30 & 31, T. 12 N., R. 43 E., Sec. 19, T. 12 N., R. 44 E., Mount Diablo Meridian	Nov. 25, 1988

